Filed 11/26/08 In re Patrick B. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re PATRICK B., a Person Coming Under the Juvenile Court Law.	B207386 (Los Angeles County Super. Ct. No. CK61079)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. HOPE P., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Stephen C. Marpet, Commissioner. Dismissed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Frank J. DaVanzo, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Hope P. (mother) appeals from a juvenile court order terminating her parental rights to her son, Patrick B. (Patrick). She contends that the juvenile court had no authority to hold a Welfare and Institutions Code section 366.26[1] hearing because she had previously filed a peremptory challenge to the juvenile court commissioner, pursuant to Code of Civil Procedure section 170.6. According to mother, because that challenge could not be waived or rescinded, any juvenile court orders made subsequent to mother's filing of the Code of Civil Procedure section 170.6 challenge are void.

Procedural barriers exist to mother's claims, compelling us to dismiss her appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Patrick is detained; Patrick's parents fail to reunify with him

On October 11, 2005, the Los Angeles County Department of Children and Family Services (DCFS) filed a section 300 petition as to Patrick. The matter was assigned to Department 410 (Comr. Stephen C. Marpet). Patrick was detained.

On November 14, 2005, DCFS filed an amended petition, setting forth allegations against both mother and Willard B. (father). Later, at the jurisdiction hearing on February 15, 2006, the juvenile court sustained many of the allegations of the amended petition.

While reunification services were originally offered, at the 12-month review hearing on November 3, 2006, the juvenile court found that mother and father had only partially complied with the case plan. Thus, it terminated reunification services and set the matter for a section 366.26 hearing.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Section 300 petition as to Patrick's sister

On February 14, 2007, DCFS filed a section 300 petition as to Karma B. (Karma),[2] a baby recently born to mother and father, due to mother and father's failure to adhere to their case plan and reunify with Patrick.

Juvenile court appoints a new attorney to represent mother in Karma's case; mother files an affidavit of prejudice against Commissioner Marpet

At the detention hearing, mother's counsel in Patrick's case, Darold Shirwo (Shirwo) sought to be appointed as her attorney in Karma's case. However, the juvenile court appointed a different attorney, William Pirtle (Pirtle). The juvenile court then noted that a Code of Civil Procedure section 170.6 affidavit of prejudice peremptory challenge to judicial officer had been filed by Pirtle,[3] requesting that the case be heard by another bench officer. Thus, the juvenile court transferred the matter to a different juvenile court (Dept. 418, Referee Jacqueline H. Lewis).[4]

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[2] Karma is not a party to this appeal.

[3] It is unclear whether Pirtle filed the Code of Civil Procedure section 170.6 declaration or whether mother filed it in propria persona. The juvenile court's minute order indicates that Pirtle filed the declaration, and the declaration itself lists Pirtle as mother's attorney of record. However, mother signed the affidavit of prejudice and the references to "attorney for a party" in the preprinted declaration have been crossed-out.

[4] At the continued hearing on March 2, 2007, the juvenile court (Comr. Marpet) reiterated that the matter was being transferred to Department 418 "which is the existing court due to the previous [Code of Civil Procedure section] 170.6 declaration filed by the mother as to the new sibling[']s petition. The child Patrick . . . is set today for a [section 366.]26 hearing with DCFS requesting termination of parent's parental rights. The court further notes off the record that due to his familiarity with the case the court would strongly consider re-appointing counsel Darold Shirwo to continue to represent the mother."

Shirwo's petition for writ of mandate

On February 20, 2007, Shirwo filed a petition for writ of mandate regarding his removal as counsel of record for mother. One week later, on February 27, 2007, this court issued an order, noting that "[i]t appear[ed] the trial court erred in removing [Shirwo] as counsel of record for [mother] from the existing dependency case. [Citations.] Accordingly, this court is considering issuing a peremptory writ of mandate in the first instance [citations] unless the superior court notifies this court . . . that it has set aside that portion of its order . . . removing [Shirwo] as counsel of record for [mother]." (*Shirwo v. Superior Court* (Feb. 27, 2007, B196764) [nonpub. opn.].)

Shirwo is appointed as mother's counsel; Shirwo rescinds the affidavit of prejudice and the matter is transferred back to Commissioner Marpet

On March 2, 2007, the juvenile court (Referee Lewis) took the election and reappointed Shirwo as mother's attorney. Referee Lewis then stated that Shirwo had advised the juvenile court that he intended to "rescind" the affidavit of prejudice previously filed by mother as to Commissioner Marpet. Thus, the entire matter was transferred back to Commissioner Marpet.

On March 6, 2007, the juvenile court (Comr. Marpet) held a hearing on "a return of a writ." "The court, having possession of the writ requesting that this court act and notify the appellate court one way or the other regarding appointment of counsel, after reviewing the document, the court is going to hereby appoint—reappoint Darold Shirwo to represent mother on the underlying case and also appoint Darold Shirwo to represent the mother on the existing new dependency case."

Contested section 366.26 hearing regarding Patrick; termination of mother's and father's parental rights

At the contested section 366.26 hearing on July 30, 2007, the juvenile court terminated mother and father's parental rights. There is no evidence that the clerk mailed notice of this order to mother and father.

On September 28, 2007, father timely filed a notice of appeal from the juvenile court's order terminating his parental rights to Patrick. On March 28, 2008, this court

affirmed the juvenile court's order.[5] (*In re P.B.* (Mar. 28, 2008, B202791) [nonpub. opn.].)

Mother's petition for writ of habeas corpus

On April 18, 2008, mother filed a petition for writ of habeas corpus, seeking relief from the fact that she had not timely filed a notice of appeal from the order terminating her parental rights to Patrick. Specifically, in her petition, mother writes: "Although [mother] directed . . . Shirwo . . . to file an appeal on her behalf, and he agreed to do so, the attorney failed to file a Notice of Appeal within the 60-day filing period." Similarly, in her writ petition, mother represented: "No Notice of Appeal was ever filed by Mr. Shirwo, however, and the 60-day deadline to do so has long since passed. The failure to timely file a Notice of Appeal, particularly when instructed to do so by a client, is ineffective assistance of counsel." Mother further argued that she had "a meritorious appeal from the order terminating parental rights on grounds she was deprived of her statutory and constitutional rights to a fair hearing before an impartial judicial officer and of her right to due process of law, under [Code of Civil Procedure section] 170.6 and the 14th Amendment to the United States Constitution, in that the hearing was conducted by a judicial officer . . . against whom [mother] had previously filed a [Code of Civil Procedure section] 170.6 'Affidavit of Prejudice,' but the affidavit was unlawfully withdrawn, without her knowledge or consent, by . . . Shirwo."

On April 29, 2008, this court denied mother's petition. (*In re Patrick B.* (Apr. 29, 2008, B207221) [nonpub. opn.].)

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[5] As we specifically noted in our opinion, mother was not a party to that appeal. (*In re P.B., supra,* B202791) [nonpub. opn.] at p. 2, fn. 1.)

Mother's appeal

On April 18, 2008, mother filed a notice of appeal from the July 30, 2007, order terminating her parental rights to Patrick.

DISCUSSION

Mother's appeal is untimely

As a preliminary matter, we hold that mother's appeal is untimely. "Notice of appeal must be filed within 60 days after the making of an appealable order or, if the matter was heard by a referee who was not sitting as a temporary judge, within 60 days after the order becomes final under rule 5.540(c)." (Cal. Rules of Court, rule 5.585(f).) "An order of a referee becomes final 10 calendar days after service of a copy of the order and findings under rule 5.538, if an application for rehearing has not been made within that time." (Cal. Rules of Court, rule 5.540(c).) Under rule 5.538(b)(3), the juvenile court referee must "[s]erve the parent and guardian, and counsel for the child, parent, and guardian, a copy of the findings and order, with a written explanation of the right to seek review of the order by a juvenile court judge." (Cal. Rules of Court, rule 5.538(b)(3).)

Here, the juvenile court issued the order terminating mother's parental rights to Patrick on July 30, 2007, yet, there is no proof of service in the appellate record. That being said, it is undisputed that (1) mother attended the July 30, 2007, hearing and knew of the juvenile court's decision; (2) father timely pursued his appeal, by filing a notice of appeal on September 28, 2007; (3) mother presumably was aware of father's appeal given the fact that they live together; and (4) mother filed a petition for writ of habeas corpus on the grounds that her attorney failed to timely file a notice of appeal on her behalf. Moreover, under Evidence Code section 664, we presume that the clerk regularly performed his or her professional duty and served notice of the juvenile court's order. (See also *In re Jason J.* (1991) 233 Cal.App.3d 710, 717, overruled on other grounds in *People v. Welch* (1993) 5 Cal.4th 228, 237 ["In the absence of an affirmative showing to the contrary, we presume that the juvenile court clerk performed the official duty to give notice"].) Under these circumstances, and "[g]iven the need for stability and certainty in child dependency matters," we readily conclude that mother's appeal, filed nine months

after the juvenile court freed Patrick for adoption, is untimely. (*David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1019–1020.) As such, we dismiss her appeal.[6] (Cal. Rules of Court, rule 8.104(b).)

Even if mother's appeal were timely, we still dismiss her appeal. Mother's sole argument is that Commissioner Marpet lacked the authority to hold a section 366.26 hearing after it accepted her Code of Civil Procedure section 170.6 peremptory challenge and then improvidently accepted Shirwo's rescission of that peremptory challenge. In other words, what mother is really challenging on appeal is the juvenile court's refusal to honor her Code of Civil Procedure section 170.6 objection, action tantamount to a denial of her peremptory challenge. That being the case, mother's appeal is improper.

Mother should have pursued a writ of mandate, not an appeal

Code of Civil Procedure section 170.3, subdivision (d) provides, in relevant part: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding." (Code Civ. Proc., § 170.3, subd. (d); see also *In re Sheila B.* (1993) 19 Cal.App.4th 187, 193–195.) The standard of review is abuse of discretion. (*Daniel V. v. Superior Court* (2006) 139 Cal.App.4th 28, 39.)

As soon as Commissioner Marpet resumed presiding over this case, in early March 2007, mother should have filed a timely petition for writ of mandate. (Code Civ. Proc., § 170.3, subd. (d) ["The petition for the writ shall be filed and served within 10 days"].) She cannot circumvent the statutorily-mandated procedure of review by pursuing an appeal. (See also *In re Sheila B.*, *supra*, 19 Cal.App.4th at p. 195 ["The

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6 In her opening brief, mother asserts that her appeal is timely pursuant to California Rules of Court, rule 8.108(f). She is mistaken. Without deciding whether this rule regarding civil appeals even applies in the instant case, pursuant to its plain language, rule 8.108(f) only applies to cross-appeals. As the instant appeal is not a cross-appeal to father's appeal, this rule does not apply.

Legislature determined in enacting [Code of Civil Procedure] section 170.3, subdivision (d), that an appellate court should have an opportunity to redress an incorrectly decided [Code of Civil Procedure] section 170.1 or 170.6 motion before the issue in the case is decided on the merits"].)

Because mother purports to appeal from a nonappealable order, her appeal is dismissed. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 86, p. 146.)

Because Commissioner Marpet was assigned this case for all purposes, mother's peremptory challenge was untimely as it was not filed within 10 days of notice of the assignment

For the sake of completeness, even if mother's appeal were timely and proper, we conclude that there was no error. The juvenile court (Comr. Marpet) never should have accepted the affidavit of prejudice in the first place; it was untimely. (Code Civ. Proc., § 170.6, subd. (a)(3).)

"As a general rule, [Code of Civil Procedure] section 170.6 permits challenge of a judge at any time before commencement of a trial or contested hearing, with three exceptions: (1) the all-purpose assignment rule (at issue in this case); (2) the master calendar rule; and (3) the '10-day/5-day' rule. [Citation.]" (*Daniel V. v. Superior Court*, *supra*, 139 Cal.App.4th at p. 39.)

"The first exception, all-purpose assignment, involves assignments that instantly pinpoint one judge who will be expected to preside at trial and to process the case in its totality from the time of the assignment, thereby acquiring expertise with the factual and legal issues in the case, which will accelerate the legal process." (*Daniel V. v. Superior Court*, *supra*, 139 Cal.App.4th at p. 39.) Code of Civil Procedure section 170.6, subdivision (a)(2) provides, in relevant part: "If directed to the trial of a cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment." (Code Civ. Proc., § 170.6, subd. (a)(2).)

Here, after DCFS filed its section 300 petition as to Patrick, the matter was assigned to Department 410, Commissioner Marpet. There is no evidence or argument

that the assignment was anything less than an "all purpose assignment." (Code Civ. Proc., § 170.6, subd. (a)(2); see also *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050; *Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 165 [appealing party has the burden of fully briefing an issue]; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) In fact, Commissioner Marpet presided over all proceedings between the time of the hearing on DCFS's section 300 petition in October 2005 through the November 3, 2006, hearing at which time the juvenile court terminated reunification services and set the matter for a section 366.26 hearing. And, throughout that time, no one objected to Commissioner Marpet. It follows that the assignment of this case to Department 410 and Commissioner Marpet was an all purpose assignment. (*People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164, 1181.)

Because the assignment of this case was an all purpose assignment, mother was required to file her peremptory challenge within 10 days of notice of the assignment. She did not do so. Accordingly, her peremptory challenge was untimely and should never have been accepted in the first place.[7] It follows that the juvenile court did not err in accepting mother's rescission, through her attorney, of her Code of Civil Procedure section 170.6 objection.

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[7] For this reason, the cases cited in mother's opening brief are distinguishable. Mother's disqualification request was untimely. It therefore was not "properly exercised" (*Louisiana-Pacific Corp. v. Philo Lumber Co.* (1985) 163 Cal.App.3d 1212, 1222) nor "duly presented" (Code Civ. Proc., § 170.6, subd. (a)(3)); it should not have been accepted and did not (nor could not) take immediate effect. (*Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1359–1360.)

Even if the assignment of this case to Commissioner Marpet was not for all purposes, mother's peremptory challenge was still untimely as it was filed after a determination of contested fact issues

Even if the assignment to Commissioner Marpet were not an "all purpose assignment," mother's peremptory challenge was still too late. As set forth above, Code of Civil Procedure section 170.6(a)(2) "permits challenge of a judge at any time before commencement of a trial or contested hearing," subject to the three exceptions mentioned. (*Daniel V. v. Superior Court, supra,* 139 Cal.App.4th at p. 39.) The statute reiterates this principle: "In the case of trials or hearings not herein specifically provided for, the procedure herein specified shall be followed as nearly as may be. The fact that a judge, court commissioner, or referee has presided at or acted in connection with a pretrial conference or other hearing, proceeding, or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not preclude the later making of the motion provided for herein at the time and in the manner hereinbefore provided." (Code Civ. Proc., § 170.6, subd. (a)(2).)

Mother's peremptory challenge was filed on February 14, 2007, months after the juvenile court held at least one contested hearing that involved "a determination of contested fact issues relating to the merits" of this dependency case.[8] (Code Civ. Proc., § 170.6, subd. (a)(2).) Specifically, on November 3, 2006, the juvenile court held a contested 12-month review hearing. Both mother and father testified. Following the presentation of evidence, the juvenile court determined that mother and father had only

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8 Arguably, the juvenile court presided over a hearing that involved "a determination of contested fact issues relating to the merits" (Code Civ. Proc., § 170.6, subd. (a)(2)) when it sustained the allegations of the amended section 300 petition on February 15, 2006. Because mother and father waived their right to trial at that stage of the proceedings, it is uncertain whether "there was . . . adjudication of any contested issue" at that time. (*Daniel V. v. Superior Court, supra,* 139 Cal.App.4th at p. 41.) We need not decide this issue because, at a minimum, the juvenile court did adjudicate contested facts at the subsequent 12-month review hearing, which, as we conclude, precluded mother from later filing a motion to disqualify Commissioner Marpet.

partially complied with their case plans and terminated unification services for them.[9] This "determination of contest fact issues" was a critical factor in this case, particularly as it related to the subsequent section 366.26 hearing.

It follows that pursuant to the plain language of Code of Civil Procedure section 170.6, subdivision (a)(2), mother could not make a peremptory challenge following the 12-month review hearing. (See also *Daniel V. v. Superior Court*, *supra*, 139 Cal.App.4th at pp. 41–42 [peremptory challenges were timely as they were made before the adjudication of any contested issue].)

DISPOSITION

The appeal is dismissed.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ

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9 Father challenged the order terminating reunification services by petition for writ of mandate; we denied his petition on the grounds that "'[s]ubstantial evidence supported the juvenile court's decision to terminate reunification services.'" (*In re P.B., supra,* B202791) [nonpub. opn.] at p. 6.)